No. 10804

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHESTER BANKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF OF APPELLEE

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SEATTLE, WASHINGTON

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

The defendant was indicted in three counts of the indictment. The first two counts accused the defendant of transferring marihuana cigarettes not in pursuance of a written order of the person to whom such marihuana was transferred, and not on a form issued in blank for that purpose by the Secretary of

the Treasury. The third and last count accuses the defendant of having possession of marihuana cigarettes not in pursuance of a written order form and without having registered and paid the special tax as required and imposed by law.

The jury returned a verdict of guilty on all three counts.

A motion for new trial was duly made (Tr. 5) and denied by the Court (Tr. 6). Judgment and sentence was entered and the defendant was sentenced to two years in the Penitentiary on Count I of the Indictment and two years on Count II of the Indictment. The sentence on Count II to run concurrently to the execution of the sentence on Count I of the Indictment. Imposition of sentence was suspended on Count III of the Indictment for a period of one year from the expiration of the sentence on Counts I and II of the Indictment (Tr. 8).

From this Judgment and Sentence this appeal is prosecuted.

There are actually three questions presented in the Brief of Appellant and set out as six assignments of error. These assignments of error can briefly be stated as follows:

QUESTIONS PRESENTED

The first question presented is whether or not the Court was correct in overruling the objection that the testimony of the witness Townsend Davidson should be stricken on the grounds that the witness was not an expert.

The second question presented is whether or not the Court was correct in failing to strike the testimony of witness Leonard Love upon motion of the defendant's counsel after the Government has rested its case and counsel for the defendant was in the midst of argument on a motion for a directed verdict.

The third question is whether or not there was sufficient evidence to go to the jury.

ARGUMENT ON FIRST QUESTION

The fact that the witness Davidson was a smoker of marihuana for ten or twelve years, his testimony as to the nature of the substance with which he was familiar was sufficient to require the submission of the question of whether or not the substance was marihuana to the jury as a question of fact. The witness possessed greater knowledge than the jury as to the fact that it was marihuana, and therefore, his testimony was of assistance to them. The qualification

to express an opinion that it was marihuana was gained from his long use of it, and in Davidson's testimony, he stated that he, Chester Banks, the defendant, and another person smoked marihuana together in Davidson's automobile (Tr. 17-18).

Pennachio v. United States, 263 Fed. 66.

The testimony of a user of marihuana for ten or twelve years, who has been charged by the Government with possession of marihuana and who has stated that he expects to plead guilty, (Tr. 20) and who smoked marihuana with the defendant Banks is sufficient to be of assistance to a jury as to whether or not the substance was marihuana.

ARGUMENT ON SECOND QUESTION

The testimony of the witness Leonard Love (Tr. 21-22) which is in point in this question is found in the testimony as to a conversation in which the word marihuana was used. The word marihuana was never used after that on direct examination. There was no objection then made to any of the testimony at the time. Here the witness Love had pleaded guilty to a marihuana charge and testified that he was an agent for the defendant Banks. The Court at all times sustained objections made by counsel for the defendant when made at the proper time.

The motion to strike the testimony of the witness Love, even if it were well taken, which fact is denied, but coming after the close of the Government's case and after a motion for a directed verdict, comes too late.

Clark v. United States, 245 Fed. 112;
Alvarado v. United States, 9 F. (2d) 385.

Whether a motion to strike out evidence admitted without objection shall be granted or refused generally rests in the sound discretion of the Court.

New York Life Ins. Co. v. Rees, 19 F. (2d) 781.

A motion made, after the evidence is admitted or the question answered, to strike it out may properly be denied, if the answer is responsive to the question, especially when the character of the evidence is apparent at the time of its admission and no reason is shown for not interposing the objection at the time the evidence was offered.

The evidence given by the witness Love was also corroborative of the testimony given by the witness Davidson. This view of the evidence was taken by the Trial Court as shown by the Trial Court's statement in the absence of the jury (Tr. 27).

We wish to urge that the testimony of the witness Love, being corroborative, placed the burden on

the appellant to show that any alleged error was prejudicial to him to the extent that on the whole record his substantial rights have been denied.

Berger v. United States, 295 U.S. 78;
Marino v. United States, 91 F. (2d) 691;
Coplin v. United States, 88 F. (2d) 652.

ARGUMENT ON THIRD QUESTION

The entire argument of the appellant as to the sufficiency of the evidence to go to the jury rests on the fact that the two witnesses were law violators themselves and, therefore, their testimony may be said to come from a polluted source.

Many times to get facts on the violations of a so-called "source" in narcotic cases, it is necessary to get evidence from known violators since these so-called "sources" do not make direct retail sales.

In the case at bar, the Court had the witnesses before it, heard their testimony and could study their demeanor on the witness stand. In the Court's opinion, their testimony was sufficient to go to the jury.

The argument of the appellant with quotations from *Salinger vs. United States*, 23 F. (2d) 48, and other cases listed on Page 11 of Appellant's Brief are not relevant here because the testimony in the case

at bar is clear and direct if the two Government witnesses are believed by the jury, and the evidence is not circumstantial as in the cases cited. If the witnesses in the case at bar are believed, there is no other hypothesis but that of guilt.

The objections made by the Appellant to the testimony only goes to the weight of such testimony since as Appellant claims, the testimony is from known law violators.

OTHER ASSIGNMENTS OF ERROR

The well settled law as to any other questions raised by Appellant's Brief in the Assignments of Error shows that such assignments are without merit. As to error in not granting the Motion for New Trial, it is well established that such an assignment is not reviewable.

McDonough v. United States, 299 Fed. 30;
Sutton v. United States, 79 F. (2d) 863;
Utley v. United States, 115 F. (2d) 117.

There was no error in failure to sustain the defendant's challenge to the legal sufficiency of the evidence and the defendant proceeded to introduce evidence on behalf of the defendant.

Clark v. United States, 245 Fed. 112.

CONCLUSION

It is respectfully submitted that the Trial Court acted correctly in denying the motions for a directed verdict and the challenge to the legal sufficency of the evidence and that the motion for a new trial should not have been granted since there was no error, therefore, the Judgment should be affirmed.

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